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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 253

GEORGE GRAFF,
Petitioner,

vs.

H. SAM PRIEST, as President of the Board of Police Commissioners of the City of St. Louis, Missouri, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now George Graff, petitioner, and respectfully petitions this Honorable Court to grant a writ of certiorari to the Supreme Court of the State of Missouri, and to remove therefrom to this Court for review the record in the case lately pending in said Supreme Court of the State of

Missouri styled "George Graff, Respondent, v. H. Sam Priest, as President of the Board of Police Commissioners of the City of St. Louis, Missouri et al., Appellants," being cause No. 40171 on the docket of said Supreme Court of the State of Missouri.

The duly certified record, including all the proceedings in the Circuit Court of the City of St. Louis, State of Missouri, wherein said cause was instituted, and in the Supreme Court of the State of Missouri, to which an appeal was taken by said H. Sam Priest, as President of the Board of Police Commissioners of the City of St. Louis, Missouri, et al., from the judgment of the trial court, is herewith filed under separate cover.

Your petitioner, George Graff, represents that he is aggrieved by the judgment of the Supreme Court of the State of Missouri entered in said cause, wherein the said Supreme Court of Missouri reversed the judgment of the trial court, and on the 12th day of May, 1947, thereafter, denied this petitioner's motion for a rehearing of said cause, or, in the alternative, to transfer said cause to said Supreme Court of the State of Missouri *en banc*, and entered a final judgment reversing the judgment of the trial court.

Your petitioner further states that the matters of issue in said cause are of a Federal nature and are of peculiar gravity and importance, in that said cause was brought to secure a determination, and involves questions, of whether an Act of the 63rd General Assembly of the State of Missouri (now published in Laws of Missouri, 1945, pp. 1032-1035, and hereinafter set out in full in the appendix hereto) is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in that the decision of the Supreme Court of the State of Missouri, complained of, is in conflict with

the applicable decisions of this Honorable Court upon the questions involved and the principles announced by this Court in those decisions.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

On July 1, 1946, and for some years prior thereto, this petitioner owned and operated a theater cafe or club known as the "Club 400", in the City of St. Louis, Missouri (R. 1-2, 33, 38). The said business of petitioner was one in which, among other things, good and wholesome food, beverages in the form of soft drinks only, and high grade entertainment by nationally known and recognized entertainers, were sold or provided for compensation, and floor shows were given at 11:00 o'clock P. M., and at 1:00 o'clock and 3:00 o'clock A. M. on each night (R. 2, 34, 38). Petitioner did not possess any license for the sale of intoxicating liquor in his theater cafe (R. 2, 34, 39), and, although he did not encourage the drinking or consumption of intoxicating liquor upon his premises, a substantial number of his adult customers were accustomed to, and did, engage in the drinking and consumption of intoxicating liquor there, and petitioner did not prohibit them from so doing (R. 2, 38). Petitioner's said business was always conducted by him, and by his customers, in a lawful and peaceful manner, without inconvenience or disturbance to others (R. 2, 38). It was built up and organized by petitioner, after many years of effort and great expense on his part, into an established course of dealing, was greatly dependent upon public confidence, estimation and good will, and was profitable to petitioner (R. 2, 34, 39). Petitioner had, and has, a large investment in the business, and in the furniture and fixtures thereof which are peculiarly adapted to petitioner's said business, at its aforementioned location (R. 2, 34, 39). In connection with

the operation of his said business, petitioner paid large sums to the city, state and federal governments for taxes (R. 2, 34, 39).

Petitioner's theatre cafe accommodated 400 or 500 customers at the tables therein (R. 21), and it had a dance floor which was hydraulically operated so that it could be raised to about the height of a table, in which position it was used as a stage for the floor shows (R. 20). These shows were of about 45 minutes duration, and were given at 11:00 p. m., 1:00 a. m. and 3:00 a. m. (R. 20, 26). In the interim between these floor shows, the dance floor, in its lowered position, was used for dancing by petitioner's customers, and an orchestra furnished music for the dancing (R. 20, 21). In this connection the petitioner was required to have a dance hall license (R. 27). Petitioner sold food to his customers, and made a charge for admission, termed a "cover charge," which included the furnishing to such of his customers as might desire a variety of kinds and flavors of soft drinks and ice to ice them (R. 19, 20, 27). Petitioner's cafe was open to the public from 10:00 p. m. to 4:00 a. m. of the day following (R. 26). Petitioner did not cater to juveniles, and his place of business was under the supervision of the delinquency squad and the morality squad of the City Police Department (R. 22). Petitioner had no license for the sale of intoxicating liquor (R. 27), did not furnish any alcoholic or intoxicating liquors to his customers in any way (R. 19), but about half of his customers, according to his estimate, were accustomed to and did consume intoxicating liquor of their own in his cafe (R. 22), and he permitted them to do so (R. 26). Petitioner advertised his business extensively and continuously, but never advertised that he sold liquor, or that he permitted the drinking of liquor upon his premises, or that he furnished "set ups" (R. 27).

By an Act of the 63rd General Assembly of the State of Missouri, approved January 18, 1946 (Laws of Missouri, 1945, pp. 1032-1035, Mo. R. S. Ann., § 4895a), effective (if valid) on July 1, 1946 (Cf. Laws of Missouri, 1945, pp. 2019, 2023), the Liquor Control Act of that state (Chap. 32, Art. 1, §§ 4874-4949, Revised Statutes of Missouri, 1939) was amended by the addition of a new section, to be known as § 4895a. This new section, by its terms, is applicable to "any person operating any premises where food, beverages or entertainment are sold or provided for compensation, who does not possess a license for the sale of intoxicating liquor"—which includes petitioner in the operation of his aforesaid business—and makes it unlawful for any such person "to permit the drinking or consumption of intoxicating liquor in, on or about said premises between ten o'clock P. M. and six o'clock A. M. the following day, without having a license as in this section provided." This new section, by its terms, further goes on to provide for the mechanics and requirements of securing a license under it; fixes the license fee; provides specific times within which and persons by whom the drinking or consumption of intoxicating liquors is permitted upon premises licensed under the section—which regulations are substantially identical with those governing places and persons licensed to sell intoxicating liquor by the drink under the Missouri Liquor Control Act;[1] empowers the Supervisor of Liquor Control of Missouri to promulgate regulations for the construction and enforcement of the section, and to suspend or revoke licenses for violations of such regulations or such section; makes it a misdemeanor for any person operating premises within the terms of this section, or any employee, agent, representative, partner or associate of such person, to knowingly violate any of the provisions of such section or any laws

[1] Cf. §§ 4885, 4891 and 4892, Revised Statutes of Missouri, 1939, as amended; Mo. R. S. Ann. §§ 4885, 4891 and 4892.

or regulations applicable to the conduct of such premises; and declares any premises operated in violation of the section, or where intoxicating liquor is consumed in violation of such section, to be a public and common nuisance which may be enjoined.

On July 2, 1946, this petitioner filed his petition in the Circuit Court of the City of St. Louis, State of Missouri (R. 1-13), to test the constitutional validity of the aforementioned Act of the 63rd General Assembly of Missouri. Petitioner's action was in the nature of one under the Missouri Declaratory Judgment Act,[2] and asked injunctive relief against the defendants (respondents here), who were the police commissioners, chief of police, chief of detectives, circuit attorney and prosecuting attorney of the City of St. Louis, Missouri, and the Supervisor of Liquor Control, Deputy Supervisor of Liquor Control and Attorney General of the State of Missouri. In his said petition this petitioner alleged that said Act was in violation of certain specified provisions of the Constitution of Missouri, and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprived this petitioner of due process of law (R. 8-9) and equal protection of the laws (R. 9-10).

Thereafter, on the same day, to wit: July 2, 1946, the said Circuit Court of the City of St. Louis, Missouri, duly made and entered of record an order, directed to the defendants in said cause (respondents here), to show cause why a temporary injunction should not be granted (R. 13).

Thereafter, on July 24, 1946, a hearing was duly had on said order to show cause why a temporary injunction should not be granted (R. 14-30), at which hearing plaintiff in said cause (petitioner here) adduced evidence in sup-

2 §§ 1126-1140, Revised Statutes of Missouri, 1939; Mo. R. S. Ann., §§ 1126-1140.

port of his said petition in said cause, and said order to show cause was taken under submission.

Thereafter, on September 9, 1946, said Circuit Court of the City of St. Louis, Missouri, duly made and entered of record an order granting plaintiff in said cause (petitioner here) a temporary injunction against defendants in said cause (respondents here), pending full and final hearing of said cause upon its merits (R. 30-31).

Thereafter, on October 1, 1946, the defendants in said cause (respondents here) filed their answer to the petition of plaintiff in said cause (petitioner here), admitting and denying various allegations of the said petition, so as to contend that the Act in question was in all respects and provisions valid and constitutional (R. 33-35).

Thereafter, on October 1, 1946, there was filed in said cause a stipulation of the parties (R. 32-33) that the cause might be taken as submitted on its merits upon the evidence adduced at the hearing on the order to show cause on July 24, 1946, and said cause was thereupon, on said 1st day of October, 1946, taken as submitted on its merits, upon said evidence, by said Circuit Court of the City of St. Louis, State of Missouri (R. 35-36).

Thereafter, on October 10, 1946, by judgment and decree duly made and entered of record in said cause (R. 37-50), said Circuit Court of the City of St. Louis, State of Missouri, ruled and held said Act of the 63rd General Assembly of Missouri to be in violation of certain provisions of the Constitution of Missouri—not here material —and in violation of the due process of law and equal protection of the laws provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 45-46, 47). Said Circuit Court, accordingly, declared said Act illegal, null, void, of no effect and unenforcible against plaintiff in said cause (petitioner here),

and permanently restrained and enjoined defendants in said cause (respondents here) from enforcing, or attempting to enforce, said Act (R. 49-50).

Thereafter, defendants in said cause (respondents here) duly appealed from said judgment and decree to the Supreme Court of the State of Missouri (R. 50-52), where the said judgment and decree of the said Circuit Court was, on April 21, 1947, reversed (R. 53-54) and an opinion filed (R. 54-64).

This petitioner, in due time, filed in said cause in said Supreme Court of the State of Missouri his motion for a rehearing, or, in the alternative, to transfer said cause to the Supreme Court of the State of Missouri *en banc* (R. 64), which said motion was entertained, but, on the 12th day of May, 1947, the said Supreme Court of the State of Missouri denied said motion (R. 65). The said Supreme Court of the State of Missouri having denied this petitioner's said motion for a rehearing, or, in the alternative, to transfer said cause to said Court *en banc*, on said date, the judgment of said Court thereupon became final.

OPINIONS OF THE COURTS BELOW.

There was no "opinion" of the trial court. The decree entered by the trial court appears at pages 37-50, inclusive, of the printed transcript of record herewith filed, but said decree is not otherwise reported.

The opinion of the Supreme Court of the State of Missouri appears at pages 54-64, inclusive, of the printed transcript of record herewith filed. It is reported as Graff v. Priest et al., 201 S. W. 2d 945, but is not yet officially reported in the Missouri Reports.

JURISDICTION OF THIS COURT.

1.

Jurisdiction of this Court is based upon Section 237 of the Judicial Code, as amended by the Act of January 31, 1928, c. 14, § 1, 45 Stat. 54, U. S. Code, Title 28, § 344, par. (b), permitting petitions for certiorari to be prayed for and issued to the highest courts of the various states where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution of the United States.

2.

The statute of the State of Missouri, the validity of which is here involved, appears in Laws of Missouri, 1945, pp. 1032-1035, and is set out *verbatim* in the Appendix hereto.

3.

The Supreme Court of the State of Missouri is the highest court of that State.

The original date of the judgment of the Supreme Court of the State of Missouri here sought to be reviewed is April 21, 1947 (R. 54).

Petitioner's motion for a rehearing, or, in the alternative, to transfer to the Supreme Court of Missouri *en banc*, was filed May 6, 1947, within the time provided by Sec. 1.19 of the Rules of that Court, and said motion was denied May 12, 1947 (R. 65).

QUESTIONS PRESENTED.

The questions to be raised and presented in this Court upon the record are, substantially:

1. Whether the Act of the Missouri Legislature here in

question, in making it a criminal offense for one person to permit another to perform an act, namely: drink or consume intoxicating liquors, the doing of which by the latter is entirely lawful and innocent, deprives the former of due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. Whether such Act, in making it a criminal offense for one person to permit another to drink or consume intoxicating liquors "in, on or about" the premises of the former, is so vague, indefinite and uncertain as to deprive the former of due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT.

I.

In this case the Supreme Court of the State of Missouri has decided a Federal question of substance, involving the validity of a statute of that State on the ground of its being repugnant to the Constitution of the United States, in a way probably not in accord with the applicable and controlling decisions of this Court.

The question is one of a general nature, involving the rights and affecting the interests of an extensive class of persons engaged in the business of selling, or providing for compensation, food, beverages in the nature of soft drinks only, and entertainment. The decision of such question strikes at the roots of personal liberties and property rights.

II.

The Supreme Court of the State of Missouri has erroneously ruled that:

(a) Due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States is not denied by a State statute which declares one person to be guilty of a criminal offense if he permits the performance by another of an act[3] which, insofar as its performance by the latter is concerned, is entirely innocent and lawful.

(b) Due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States is not denied by a State statute which, with reference to an element of conduct declared to be criminal,[4] prescribes no standard that it is possible to know, is uncertain and ambiguous, and is in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application.

III.

The opinions and decisions of this Court hold and rule that:

(a) Certain fundamental freedoms, while not the subject of direct constitutional grant, are constitutionally recognized and confirmed as attributes of liberty incident to all free men, and, as such are secured, by the Fourteenth Amendment to the Constitution of the United States, against abridgement by the States. Among such free-

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[3] In this particular instance, the act of drinking or consuming intoxicating liquors.

[4] In this particular instance, the act of permitting the drinking or consumption of intoxicating liquors "in, or or about" his premises, by "any person operating premises where food, beverages or entertainment are sold or provided for compensation, who does not possess a license for the sale of intoxicating liquor."

doms are the rights to contract, to engage in any of the common occupations, and to enjoy those privileges long recognized at common law as essential to the pursuit of happiness by free men.

(b) A legislative enactment of a State which, with reference to an element of conduct declared to be criminal, prescribes no standard of conduct which it is possible to know, or is in terms so vague and indefinite that men of common intelligence must guess as to its meaning and differ as to its application, violates fundamental principles of justice enbraced in the concept of due process of law, and violates the Fourteenth Amendment.

It follows that, under the principles of the controlling decisions of this Court, where (as here) an enactment of a State legislature violates fundamental concepts of due process of law, by making one person guilty of a criminal offense when he permits another to perform an act which in so far as concerns such other is entirely lawful and innocent, and by being so vague and indefinite, with reference to an element of conduct declared to be criminal, as to prescribe no standard of conduct that it is possible to know, it must be stricken down as repugnant to the Fourteenth Amendment to the Constitution of the United States.

PRAYER.

For the purpose of correcting the errors complained of, and to the end that the rights of petitioner may be determined in accordance with the Constitution of the United States, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of the State of Missouri, commanding it to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Supreme Court of

the State of Missouri in the within described cause of George Graff, Respondent, v. H. Sam Priest, as President of the Board of Police Commissioners of the City of St. Louis, Missouri et al., Appellants, No. 40171, to the end that the judgment of said Supreme Court of the State of Missouri in said cause may be reviewed by this Court, as provided by law, and that your petitioner may have such other relief as to this Court may seem appropriate, and that the judgment of said Supreme Court of the State of Missouri may be reversed by this Honorable Court.

GEORGE GRAFF,

Petitioner,

By ROBERTS P. ELAM,

Counsel for Petitioner.

SUPPORTING BRIEF.

I.

The Act of the 63rd General Assembly of Missouri here in question violates the natural rights and securities of petitioner, and deprives petitioner of his liberty and property, without due process of law, and is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, because:

(A) The constitutional guaranties of "liberty" and "property" include (1) the right to perform, and to permit another to perform, any wholly innocent and lawful act, (2) the right to engage in any common lawful occupation, and (3) in the pursuit thereof, the right to contract with others respecting any lawful subject matter.

Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042;
Allgeyer v. Louisiana, 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 882;
Adair v. U. S., 208 U. S. 161, 28 S. Ct. 277, 52 L. Ed. 436;
Coppage v. Kansas, 236 U. S. 1, 35 S. Ct. 240, 59 L. Ed. 441;
Adams v. Tanner, 244 U. S. 590, 37 S. Ct. 662, 61 L. Ed. 1336.

(B) An act of a State legislature, such as the act here in question, which makes it a criminal offense for one person to permit the doing by another of a wholly innocent and lawful act, is not only void because unreasonable and arbitrary, but deprives the former person of liberty and property without due process of law. It is not within the

power of the legislature to declare that to be a crime which is wholly innocent and lawful.

Coppage v. Kansas, 236 U. S. 1, 35 S. Ct. 240, 59 L. Ed. 441;
Pierce v. Society of Sisters, 268 U. S. 310, 45 S. W. 571, 69 L. Ed. 1070.

(C) A State legislature cannot, under the mere guise of police regulations, take away or abridge rights secured to citizens by the constitutional due process clause. Such rights may reasonably be abridged by police regulations only when such regulations bear a direct relationship to the evil sought to be remedied. Such is not the case here.

Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042;
Jacobson v. Massachusetts, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 642;
Lochner v. New York, 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937;
Lawton v. Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385;
House v. Mayes, 219 U. S. 270, 31 S. Ct. 234, 55 L. Ed. 213.

II.

The Act of the 63rd General Assembly of Missouri here in question further violates the natural rights and securities of petitioner, and deprives him of his liberty, without due process of law, and is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, because, with reference to conduct declared criminal by such Act, the Act prescribes no standard of conduct that it is possible to know, and is so vague, uncertain and ambiguous that men of common intelligence must

necessarily guess at its meaning and differ as to its application.

U. S. v. L. Cohen Grocery Co., 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516;

Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888;

Collins v. Kentucky, 234 U. S. 634, 34 S. Ct. 924, 58 L. Ed. 1510;

International Harvester Co. v. Kentucky, 234 U. S. 216, 34 S. Ct. 853, 58 L. Ed. 1284;

American Seeding Machine Co. v. Kentucky, 236 U. S. 660, 35 S. Ct. 456, 59 L. Ed. 773.

ARGUMENT.

Petitioner submits that the Act of the Missouri Legislature here in question violates his natural and fundamental rights, and deprives him of his liberty and property, without due process of law, so as to be violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, for several reasons.

I.

(A) In every free government, every citizen and freeman is endowed with certain rights and privileges, to enjoy which no written law or statute is required. These are "fundamental," "inalienable," or "natural" rights, recognized among all free people. They are referred to in the second paragraph of the Declaration of Independence, wherein it is said:

> "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure [protect or make certain] these rights, governments are instituted among men, * * *" (Bracketed portion supplied),

are also referred to in the Preamble to the Constitution of the United States, wherein that document was proclaimed to be established in order to

> "* * * secure [protect and make certain] the blessings of liberty * * *" (Bracketed portion supplied.)

To protect these "inalienable," "fundamental," or "natural" rights, the Fourteenth Amendment to the Constitution of the United States provides:

> "* * * nor shall any State deprive any person of life, liberty or property without due process of law * * *."

By the term "liberty," in these organic provisions, is not meant mere freedom from physical or bodily restraint. As was aptly said in Meyer v. Nebraska, 262 U. S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual **to contract, to engage in any of the common occupations of life,** to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, **and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.** (Citing many cases.)" (Emphasis supplied.)

It would serve no useful purpose—even if it were possible—for us to here undertake to define and describe all of the various acts which might be encompassed within the term "those privileges long recognized at common law as essential to the order pursuit of happiness by free men," as that term is used by this Court to characterize the "liberty" guaranteed by the constitutional due process clauses. We shall, accordingly, confine ourselves to such as are deemed pertinent to the case at bar.

Plainly and specifically, the quoted terms include **the right to contract regarding lawful subject matter** (Meyer v. Nebraska, supra; see, also, Allgeyer v. Louisiana, 165 U. S. 578, 590, 17 S. Ct. 427, 41 L. Ed. 832; Adair v. United States, 208 U. S. 161, 28 S. Ct. 277, 52 L. Ed. 436; Coppage

v. Kansas, 236 U. S. 1, 16, 35 S. Ct. 240, 59 L. Ed. 441; Adams v. Tanner, 244 U. S. 590, 37 S. Ct. 662, 61 L. Ed. 1336); and **the right to engage in any common occupation of life otherwise lawful** (Meyer v. Nebraska, supra; Adams v. Tanner, supra; Butcher's Union Co. v. Crescent City Co., 111 U. S. 746, 762; Powell v. Pennsylvania, 127 U. S. 678, 683); and, we confidently assert, they also include **the right to permit others to perform any and all acts which, in themselves, are wholly innocent and legal**—which, in fact, is not only a right, but a duty.

(B) It is notable that the act of the 63rd General Assembly of Missouri here in question does not make unlawful at any time the drinking or consumption of intoxicating liquors upon or about premises where food, beverages or entertainment are sold or provided for compensation—or at any other place, for that matter. **Under the Missouri law, one may drink or consume intoxicating liquor at whatever time he may please and wherever he may please, without violating any law.** What the act in question does is to make it unlawful, and criminal, for the operator of any premises where food, beverages or entertainment are sold, etc., **to permit** the drinking or consumption of intoxicating liquor by another—a wholly innocent and lawful act—upon or about such premises during certain times of the day. The act in question, accordingly, makes it unlawful, and criminal, for the operators of such premises, including this petitioner, to

1. Permit another to perform a wholly innocent and lawful act,

2. Thereby, himself perform a wholly innocent and lawful act,

3. Engage in a common occupation otherwise lawful, and

4. Contract with his customers regarding the sub-

> ject matter of their drinking or consuming intoxicating liquor—wholly lawful conduct on their part—upon his premises.

It is these things which the trial court denied, and this petitioner denies, the power of the State legislature to do under the due process clauses of the Fourteenth Amendment to the Federal Constitution. Their relationship permits them to be considered together, with some adherence to the order in which they are above set out.

It seems almost too plain for argument that a legislative enactment which makes it unlawful and criminal for one person to permit another to do a lawful act is not only not "due process of law"—i. e., is not, as said by Mr. Webster, "the general law" or "general rules which govern society" —but is, and must be declared to be, an arbitrary and unreasonable legislative judgment or fiat. This necessarily follows from the well-settled principle that a legislature may not define as criminal that which is, in itself, wholly innocent and lawful.

In Coppage v. Kansas, 236 U. S. 1, 16, 35 S. Ct. 240, 59 L. Ed. 441, this Court said:

> "Nor can a State * * * render criminal any normal and essentially innocent exercise of personal liberty or of property rights; for to permit this would deprive the Fourteenth Amendment of its effective force in this regard."

See, also, Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070.

A restaurateur, theater operator, shopkeeper, or the like, in the operation of his business must, of necessity, contract with those whom he invites upon his premises in the conduct of his business. His invitation for them to come upon his premises, in itself, implies a contract between

him and his patron or customer to come upon the premises —otherwise the patron or customer would be a trespasser. The terms of the contract between the two may be limited by the operator of the premises as he sees fit, and he may restrict conduct of the patron on the premises which would otherwise be entirely innocent. For example: a restaurant operator might, if he wishes, refuse to permit his patrons to be without a coat (a not uncommon situation in hotel dining rooms), or he might refuse to permit his patron to smoke upon the premises (for aesthetic reasons)—both of which would otherwise be wholly innocent and lawful, but which are, nevertheless, the appropriate subject of the contract of invitation between the proprietor of the business and his patron. This right of contract regarding lawful conduct of the operator's patrons on his premises, in the conduct of an innocent and lawful business in which he has a right to engage, is a valuable property right, as well as an integral part of his personal liberty, both of which necessarily are guaranteed by the constitutional due process clauses. In this connection, there should be considered the language in Allgeyer v. Louisiana, 165 U. S. 578, 590, 17 S. Ct. 427, 41 L. Ed. 832, to the effect that:

> "In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto."

If a State Legislature can, as is done by the Act here in question, make one person criminally liable for permitting another to perform the act of drinking or consuming intoxicating liquor, when such act is wholly innocent and lawful insofar as concerns the person performing it, then there is no limit to what a State Legislature can do. It could make one person criminally liable for not compelling another to perform that same act! And it

could compel the hotel proprietor, mentioned in the analogy made in the preceding paragraph of this brief, to permit his patrons to wear or not wear their coats in the hotel dining room. The arbitrariness, unreasonableness and invalidity of the legislation suggested would be immediately manifest.

If an operator of premises where food, beverages or entertainment are sold or provided for compensation obeys the act of the 63rd General Assembly of Missouri here in question, he is thereby deprived of fundamental rights: the liberty of conducting a common and lawful business in such a way as to permit his customers to perform on his business premises acts which in themselves are wholly innocent and lawful, and the right to contract (which relates to both liberty and to property rights) with his customers regarding the subject matter of conduct by them upon his premises which is wholly innocent and lawful but which consists of their drinking or consuming intoxicating liquors—a right which, we digress to point out, is one possessed by all other persons engaged in the common occupations of life. If he disobeys the Act, he is to be subject to arbitrary arrest and to be punished criminally for permitting the doing by his customers of acts which are in themselves wholly innocent and lawful, and, thereby, for himself performing an act which is wholly innocent and lawful. In either event, he is deprived of his fundamental rights of liberty and property, arbitrarily and unreasonably, and without due process of law.

(C) In presenting the foregoing argument, we wish to be understood as not controverting the power of a State Legislature, in the exercise of the police power, to regulate—or even prohibit entirely—the drinking or consumption of intoxicating liquors in public places, or in semi-public places such as the place of business of this peti-

tioner. However, we submit that, the ruling of the Supreme Court of Missouri to the contrary[5] notwithstanding, the Missouri Legislature has not done that by the Act here in question.

That the Act here in question does not regulate the drinking or consumption of intoxicating liquor, but regulates the business of providing food, beverages or entertainment, is readily demonstrable. That Act, by its terms, applies only to persons operating premises where food, beverages or entertainment are sold or provided for compensation, who do not possess a license for the sale of intoxicating liquor. Under the terms of the Act, any **patron** of an operator of such premises may drink or consume intoxicating liquor upon such premises at any and all times of any and all days, without coming within the terms of the Act; but, if the **operator** of such premises **permits** any patron to drink or consume intoxicating liquor upon such premises during certain hours of certain days, such **operator** violates the terms of the Act, is guilty of a criminal offense, and is subject to the penalties prescribed. Thus, by its terms, the Act is not applicable to the drinker or consumer of intoxicating liquor, nor to persons legally engaged in the liquor traffic, but is applicable only to persons who are not engaged in the liquor business and who operate premises where food, beverages or entertainment are sold or provided.

In any event, however, the Act in question cannot be upheld as a proper exercise of the police power. We fully recognize that, for the preservation of the public health, morals, welfare or safety—i. e., in the exercise of the police power—the rights of "liberty" and "property" guaranteed by the constitutional due process clause reasonably may be intrenched upon by the State Legislature, pro-

[5] Cf. Graff v. Priest, 201 S. W. 2d 945, 951.

vided, and only in the event, that such intrenchment relates directly to the evil sought to be remedied.

In Meyer v. Nebraska, 262 U. S. 390, 400, 43 S. Ct. 626, 67 L. Ed. 1042, it was said:

> "The established doctrine is that this liberty [guaranteed by the Fourteenth Amendment] may not be interfered with under the guise of protecting the public interest, by legislative action that is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts." (Bracketed portion supplied for continuity.)

In Jacobson v. Massachusetts, 197 U. S. 11, 25, 25 S. Ct. 358, 49 L. Ed. 643, it was said that:

> "A local enactment or regulation, even if based on the acknowledged police powers of a State, **must always yield in case of conflict** with the exercise by the General Government of any power it possesses under the Constitution, or **with any right which that instrument gives or secures.** (Citing cases.)" (Emphasis supplied.)

In Lochner v. New York, 198 U. S. 45, 56, 25 S. Ct. 539, 49 L. Ed. 937, it was said:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this proposition. Otherwise, the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people."

And, further (198 U. S., l. c. 57-58):

> "The mere assertion that the subject relates, though in a moderate degree to public health [morals, welfare or safety] does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate, before an act can be held valid which interferes with the general right of an individual to be free in his person * * *." (Bracketed portion supplied for continuity.)

In Lawton v. Steele, 152 U. S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385, it was said:

> "The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of the police powers is not final or conclusive, but is subject to the supervision of the courts."

To like effect is House v. Mayes, 219 U. S. 270, 31 S. Ct. 234, 55 L. Ed. 213.

If the Act of the 63rd General Assembly of Missouri here in question was intended to be in the proper exercise of the police power, and to preserve the public health, morals, welfare or safety, by prohibiting or regulating the alleged evil of drinking or consumption of intoxicating liquor, then it is exceedingly strange that it did not prohibit the drinking or consumption of intoxicating liquor at all or certain designated places, at all or certain designated times, but, on the contrary, made no attempt to make such conduct unlawful at any place or at any time. What that Act did do was, not to regulate the drinking or consumption of intoxicating liquor, but to regulate the wholly innocent and lawful common occupations of selling or providing food, beverages or entertainment, under the guise of protecting

the public interests. That this is true is demonstrated by the fact that, if this act can be upheld as proper to preserve the public health, etc., and within the police power, as a regulation of the drinking or consumption of intoxicating liquor, then there is no end to the character of businesses which may be similarly regulated upon that same ground, **notwithstanding that the act of drinking or consumption of intoxicating liquor anywhere and at any time remains a wholly innocent, permissible and lawful act.**

As is plainly apparent from the very language of the Act in question, the protection of the public interests by regulation of the drinking or consumption of intoxicating liquor—the police power—is but a guise or masquerade under which the legislature has arbitrarily and unreasonably interfered with, molested and regulated the wholly innocent and lawful businesses of selling or providing food, beverages or entertainment, and invaded, abridged and hampered the rights of citizens to engage in and carry on such businesses. The Act, accordingly, under the authorities hereinbefore mentioned, was properly stricken down by the trial court, and should be again stricken down by this Court, as an unreasonable and unwarranted violation of constitutional guaranties under the Fourteenth Amendment.

II.

We submit that the Act of the 63rd General Assembly of Missouri here in question is, furthermore, violative of the due process of law guarantee of the Fourteenth Amendment in that it makes it unlawful for the operator of any premises where food, beverages or entertainment are sold, etc.,

> "* * * to permit the drinking or consumption of intoxicating liquor in, on or **about** such premises * * *."

The terms "in" and "on," in their relation to the premises described, are plain enough, but the use of the term "about," in relation to such premises, makes the Act vague, indefinite and uncertain so as to be likely to produce unusual—if not even weird—results. That the Missouri Legislature, by its use of the word "about," intended to make it unlawful for a proprietor of the designated type of premises to permit intoxicating liquor to be drunk or consumed in the vicinity of or near to his premises, as well as "in" or "on" them, is manifest from the Legislature's use of the word "about" in the disjunctive with the words "in" and "on." Under this Act, an operator of such premises could never know whether or not he was violating the Act if he permitted the drinking or consumption of intoxicating liquor upon the public streets, sidewalks and alleys, or even upon other private premises, adjacent to or near his premises—and what right would he have, or what duty could the Legislature place upon him, to prohibit such conduct (lawful insofar as concerned the person engaged in it) in such places? An operator of the designated type of premises could never know how far away therefrom the drinking or consumption of intoxicating liquor would have to take place before it was no longer "about" his premises.[6] He could never know whether he would be violating the Act if he permitted the drinking or consumption of intoxicating liquor in or on other places of business, or even private residential space, which might be located in the same building as his place of business.[7]

The vagueness, indefiniteness and ambiguity of the Act here complained of by this petitioner are but enhanced and magnified by what the Supreme Court of Missouri said in this connection, as follows (emphasis supplied):

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[6] Cf. Patterson v. State, 36 Ala. 297.

[7] Cf. William A. Doe Co. v. City of Boston, 262 Mass. 458, 160 N. E. 262.

> "Also, plaintiff says that the preposition 'about' in the phrase 'in, on or about said premises,' as used in the act, makes it so vague that the average person would not know when he might be violating the act. If a case should arise where guilt hinged on the scope of 'about,' **such would be a question of fact for the trier of the facts or of law for the court, as the court determined.**" Graff v. Priest, 201 S. W. 2d 945, 951.

Evidently it is the concept of the Supreme Court of Missouri that it is not the Act itself, but the judicial proceedings and rulings under it, which may prescribe the rule governing conduct and warning against transgression, and that persons may be required at peril of life, liberty or property to speculate concerning the meaning of such Act. Such concept is contrary to the principles announced by this Court in Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888.

The foregoing demonstrates that, with reference to an element of conduct declared to be criminal, the Act here in question prescribes no standard of conduct that it is possible to know, is uncertain and ambiguous, and is in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application. That legislation of such character is void, because it violates fundamental principles of justice and violates the guarantee of due process of law made by the Fourteenth Amendment, is well settled. Compare: Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888; U. S. v. L. Cohen Gro. Co., 255 U. S. 81, 41 S. Ct. 598, 65 L. Ed. 516; American Seeding Machine Co. v. Kentucky, 236 U. S. 660, 35 S. Ct. 456, 59 L. Ed. 773; Collins v. Kentucky, 234 U. S. 634, 34 S. Ct. 924, 58 L. Ed. 1510; International Harvester Co. v. Kentucky, 234 U. S. 216, 34 S. Ct. 853, 58 L. Ed. 1284.

CONCLUSION.

From the foregoing, we submit that it clearly appears that the Act of the 63rd General Assembly of Missouri here in question (Laws of Missouri 1945, pp. 1032-1035) deprives this petitioner of his liberty and property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

It consequently follows that the Supreme Court of Missouri was in error in holding and ruling to the contrary. Petitioner, therefore, respectfully submits that this Honorable Court should issue a writ of certiorari in order that such error may be corrected, in order that the judgment of the Supreme Court of Missouri may be reversed, and in order that this petitioner may receive the benefits of the due process of law guaranteed him by the Federal Constitution.

Respectfully submitted,

ROBERTS P. ELAM,
Counsel for Petitioner.

APPENDIX.

The Act of the 63rd General Assembly of Missouri here involved, being reported in Laws of Missouri, 1945, pp. 1032-1035, inclusive, is in words and figures as follows:

AN ACT

To amend Article 1, Chapter 32 of the Revised Statutes of Missouri, 1939, known as the Liquor Control Act, by adding a new section to said Article 1, Chapter 32 to be known as Section 4895a, regulating the drinking and consumption of intoxicating liquor in premises where food, beverages or entertainment are sold or provided for compensation; providing for the issuance of licenses to operate such premises and fixing the fees therefor; providing for the issuance of licenses to operate such premises by incorporated cities having a population of more than twenty thousand inhabitants; providing that such cities, may, by ordinance, further regulate the drinking and consumption of intoxicating liquor on such premises; providing qualifications for persons to whom a license may be granted and the giving of a bond by the applicant therefor before approval of a license; regulating the drinking and consumption of intoxicating liquor on premises licensed for sale of intoxicating liquor by the drink; providing that premises operated in violation of this Act are a public and common nuisance; providing for enjoining the same; providing that persons violating this Act shall, upon conviction, be guilty of a misdemeanor; providing that the Supervisor of Liquor Control may issue regulations for enforcement of this Act; and containing a saving clause.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That Article 1, Chapter 32, Revised Statutes of Missouri, 1939, known as the Liquor Control Act, be and the same is hereby amended by adding to said Article 1, Chapter 32, a new section to be known as Section 4895a, regulating the drinking and consumption of intoxicating liquor in premises where food, beverages or entertainment are sold or provided for consumption; providing for the issuance of licenses to operate such premises and fixing the fees therefor; providing for the issuance of licenses to operate such premises by incorporated cities having a population of more than twenty thousand inhabitants; providing that such cities may, by ordinance, further regulate the drinking and consumption of intoxicating liquor on such premises; providing qualifications for persons to whom a license may be granted and the giving of a bond by the applicant therefor before approval of a license; regulating the drinking and consumption of intoxicating liquor on premises licensed for sale of intoxicating liquor by the drink; providing that premises operated in violation of this Act are a public and common nuisance; providing for enjoining the same; providing that persons violating this Act shall, upon conviction, be guilty of a misdemeanor; providing that the Supervisor of Liquor Control may issue regulations for enforcement of this Act; and containing a saving clause, which new section shall read as follows:

Section 4895a. It shall be unlawful for any person operating any premises where food, beverages or entertainment are sold or provided for compensation, who does not possess a license for the sale of intoxicating liquor, to permit the drinking or consumption of intoxicating liquor in, on or about said premises between ten o'clock P. M. and six o'clock A. M. the following day, without having a license as in this section provided.

Application for such license shall be made to the Supervisor of Liquor Control on forms to be prescribed by him, describing the premises to be licensed and giving all other reasonable information required by the form. The license shall be issued upon the payment of the fee required herein. A license shall be required for each separate premises and shall expire on the 30th day of June next succeeding the date of such license. The license fee shall be $60.00 per year and the applicant shall pay $5.00 for each month or part thereof remaining from the date of the license to the next succeeding 1st of July. Applications for renewals of licenses shall be filed on or before the 1st of May of each year.

The drinking or consumption of intoxicating liquor shall not be permitted in, upon or about the licensed premises by any person under twenty-one years of age, or by any other person between the hours of 1:30 A. M. and 6:00 A. M. on any week day, and between the hours of 12 o'clock midnight Saturday and 12 o'clock midnight Sunday, or on the day of any general, special, or primary election in this state, or upon any county, township, city, town, or municipal election day during the hours the polls are legally open. Licenses issued hereunder shall be conditioned upon the observance of the provisions of this Act and the regulations promulgated thereunder governing the conduct of premises licensed for the sale of intoxicating liquor by the drink. The provision of this section regulating the drinking or consumption of intoxicating liquor between certain hours and on Election day and Sunday shall apply also to premises licensed under this Act to sell intoxicating liquor by the drink. In any incorporated city having a population of more than twenty thousand (20,000) inhabitants, the Board of Aldermen, City Council, or other proper authorities of incorporated cities may, in addition to the license fee herein required, require a license not exceeding Three hundred dollars

($300.00) per annum, payable to said incorporated cities, and provide for the collection thereof; make and enforce ordinances regulating the hours of consumption of intoxicating liquors on premises licensed hereunder, not inconsistent with the other provisions of this law, and provide penalties for the violation thereof. No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village.

Before any application for the license herein provided for shall be approved, the Supervisor of Liquor Control shall require of the applicant a bond to be given to the State in the sum of one thousand dollars ($1,000.00), with sufficient surety, such bond to be approved by the Supervisor of Liquor Control, conditioned that the applicant shall at all times observe the provisions of this Act and the Regulations promulgated thereunder governing the conduct of premises licensed for the sale of intoxicating liquor by the drink and the Regulations promulgated by him construing and enforcing the provisions of this section.

Any premises operated in violation of the provisions of this section, or where intoxicating liquor is consumed in violation of this section, is hereby declared to be a public and common nuisance and it shall be the duty of the Supervisor of Liquor Control and of the Prosecuting or Circuit Attorney of the City of St. Louis, and the Prosecuting Attorney of the county in which the premises are located to enjoin such nuisance.

Any person operating any premises, or any employee, agent, representative, partner or associate of such person,

who shall knowingly violate any of the provisions of this section, or any of the laws or regulations herein made applicable to the conduct of such premises, shall, upon conviction, be deemed guilty of a misdemeanor.

The Supervisor of Liquor Control is hereby empowered to promulgate regulations necessary or reasonably designed to enforce or construe the provisions of this section, and is empowered to revoke or suspend any license issued hereunder, as provided in this Act, for violation of this section or any of the laws or regulations herein made applicable to the conduct of premises licensed hereunder.

Section 2. If any section, sentence, clause or phrase of this Act is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portion of the Act.

FILE COPY

SUPREME COURT

OCTOBER TERM, 1947

No. 283

GEORGE GRAFF, Petitioner,

vs.

H. SAM PRIEST, as President of the Board of Police Commissioners of the City of St. Louis, Respondents.

RESPONDENTS' SUGGESTIONS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

JAMES V. FRANK,
Associate City Counselor of the City of St. Louis, Missouri,
JAMES W. GRIFFEN,
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J. E. TAYLOR,
Attorney General of the State of Missouri,
Attorneys for Respondents.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 253.

GEORGE GRAFF, Petitioner,

vs.

H. SAM PRIEST, as President of the Board of Police Commissioners of the City of St. Louis, Respondents.

RESPONDENTS' SUGGESTIONS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 253.

GEORGE GRAFF, Petitioner,

vs.

H. SAM PRIEST, as President of the Board of Police Commissioners of the City of St. Louis, Missouri, et al., Respondents.

RESPONDENTS' SUGGESTIONS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondents herein deny that your petitioner, George Graff, has been aggrieved by the judgment of the Supreme Court of the State of Missouri, entered in the cause styled "George Graff, Respondent, v. H. Sam Priest, as President of the Board of Police Commissioners of the City of St. Louis, Missouri, et al., Appellants," being cause No. 40171 on the docket of said Supreme Court of the State of Missouri, and reported as Graff v. Priest et al., 201 S. W. 2d 945, not yet offically reported in the Missouri Reports. Said Supreme Court of Missouri reversed the judgment of the trial

court, and on the 12th day of May, 1947, denied said petitioner, George Graff, his motion for a rehearing of said cause, or, in the alternative, to transfer said cause to said Supreme Court of the State of Missouri *en banc*, but said Supreme Court of the State of Missouri did enter final judgment reversing the judgment of the trial court.

Your respondents further deny that the matters of issue in said cause are of a Federal nature and are of peculiar gravity and importance, but assert that said issues are purely within the power and province of the State of Missouri, and in no way do the determinations aforesaid made affect any right guaranteed under the Constitution of the United States. That the respondents further declare that the only issue in said cause was a determination of the constitutional validity of an Act of the 63rd General Assembly of the State of Missouri (now published in Laws of Missouri, 1945, pp. 1032-1035, and set out in full in the appendix to Petition, pp. 31-35). The constitutionality of said act was upheld in the opinion of the Supreme Court of the State of Missouri, as set out in full in the petitioner's Transcript of the Record, pp. 54-64. Therein, the Supreme Court of the State of Missouri declared that said act was not violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States citing the applicable decisions of this Honorable Court upon the question involved and the principles announced by this Court in said decisions.

The duly certified record, including all the proceedings in the Circuit Court of the City of St. Louis, State of Missouri, wherein said cause was instituted, and in the Supreme Court of the State of Missouri, to which an appeal was taken by said H. Sam Priest, as President of the Board of Police Commissioners of the City of St. Louis, Missouri,

et al., from the judgment of the trial court, was herewith filed under separate cover, in petitioner's Transcript of the Record.

Wherefore your respondents deny that said petitioner was in any way aggrieved on any issues before the Supreme Court of the State of Missouri or by any of its acts or decisions.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The petitioner in this case conducted a Night Club and Restaurant, open to the public, in which he sold food and non-alcoholic beverages to his customers and provided music, entertainment and shows, the floor shows being given at 11:00 o'clock P. M., 1:00 o'clock A. M. and 3:00 o'clock A. M. on each night. Petitioner did not possess a license under the Liquor Control Act of the State of Missouri (R. 19) for the sale of intoxicating liquor. Under the Liquor Control Act of Missouri persons licensed to sell intoxicating beverage by the drink for consumption on the premises are required to close their establishments at 1:30 o'clock A. M. on week nights and at 12:00 o'clock P. M. on Saturday night. The petitioner, prior to the enactment of the statute in question, not being required to have a license under the Liquor Control Act because he did not sell alcoholic beverages, was not required to observe the closing hours provided under the Liquor Control Act. Approximately half of the petitioner's customers, however, brought their own intoxicating liquor with them and engaged in the drinking and consumption of intoxicating liquor on his premises, with his permission, during all hours of the night, until his establishment closed approximately at 4:00 o'clock A. M. (R. 2, 38.)

The Act of the 63rd General Assembly of the State of Missouri, approved January 18, 1946, which is challenged by the petitioner, required any person operating any premises where food, beverages or entertainment are sold or provided for compensation, who permitted the drinking or consumption of intoxicating liquor in or about said premises after 10:00 o'clock P. M., to secure a license from the Supervisor of Liquor Control at the cost of $60.00 per year. The law further provides,

> "The drinking or consumption of intoxicating liq rs shall not be permitted in, on or about the licensed premises * * by any * * person between the hours of 1:30 A. M. and 6:00 A. M. on any week day and between the hours of 12:00 o'clock midnight Saturday and 12:00 o'clock midnight Sunday," and on certain other days."

The Act further provides that the provision regulating the drinking or consumption of intoxicating liquors between certain hours and on certain days shall also apply to premises licensed under the Liquor Control Act to sell intoxicating liquor by the drink. The law was enacted as an amendment to the Liquor Control Act of the State of Missouri.

The petitioner testified that the effect of not permitting the consumption of intoxicating liquor on his premises between the hours of 10:00 P. M. and 6:00 A. M., or between the hours of 1:30 A. M. and 6:00 A. M., would greatly lessen his patronage (R. p. 26).

The petitioner accurately states the facts involved and the procedure of the State courts on pages 3-8 of said petition. The same is hereby adopted as an acurate resume by respondents herein.

OPINIONS OF THE COURTS BELOW.

There was no "opinion" of the trial court. The decree entered by the trial court appears at pages 37-50, inclusive, of the printed transcript of record herein filed, but said decree is not otherwise reported.

The opinion of the Supreme Court of the State of Missouri appears at pages 54-64, inclusive, of the printed transcript of record herein filed. It is reported as Graff v. Priest et al., 201 S. W. 2d 945, but is not yet officially reported in the Missouri reports.

JURISDICTION OF THIS COURT.

The jurisdictional statement of the petitioner is adopted by the respondents herein.

QUESTIONS PRESENTED.

I.

The questions to be raised and presented in this Court upon the record are, substantially:

A. Whether the Act of the Missouri Legislature here in question, in making it a criminal offense for one person to permit another to perform an act, namely; drink or consume intoxicating liquors, the doing of which by the latter is entirely lawful and innocent, deprives the former of due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

B. Whether such Act, in making it a criminal offense for one person to permit another to drink or consume intoxicating liquors "in, on or *about*" the premises of the former, is so vague, indefinite and uncertain as to deprive the former of due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

SUPPORTING BRIEF.

I.

The Act of the 63rd General Assembly of Missouri here in question does not violate the natural rights and securities of petitioner, and does not deprive petitioner of his liberty and property, without due process of law, and in no way can be considered as in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

II.

The Supreme Court of the State of Missouri did rule that: (a) That the act in question, Section 4895a, Laws of Missouri, 1945, does not violate the Federal guarantee of due process of law. (b) That the act in question, Section 4895a, Laws of Missouri, 1945, does regulate the consumption of intoxicants and does set up and establish definite standards of conduct, so that ordinary men would not differ as to the meaning of said section.

III.

The prohibition and/or regulation of intoxicants is a matter within the power of the State.

IV.

All the regulations and/or prohibitions relating to intoxicants grow out of the police power of the State.

V.

The State having the power to prohibit intoxicants by an exercise of its police power, it has the lesser power to appropriately regulate intoxicants in any manner which is to the general good of its citizenry.

VI.

The present statute, Section 4895a, Laws of 1945, supra, is a reasonable regulation of intoxicants.

ARGUMENT.

It is encumbent upon the petitioner to establish that the State Court has decided a federal question of substance not heretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

It is the contention of the petitioner that the State Court has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court (p. 10, petition for writ of certiorari).

The petitioner has cited a number of cases which hold that a State may not deprive a citizen of his liberty, which liberty includes the right to engage in certain lawful and innocent activities, such as the right to engage in the common occupation of life, which we assume would cover the right to sell food, beverages and entertainment in the operation of a night club. It does not follow, however, that the State has no power to prohibit the operation of such an establishment which not only permits the drinking of alcoholic beverages as an adjunct of its business, but where its very success is dependent upon this propensity of its customers. While it may be that the right to engage in the petitioner's occupation may be a liberty protected by the Constitution, it does not follow that the State cannot regulate such a business to the extent of prohibiting the permissive consumption of alcoholic beverages by customers during certain hours of the late night and early morning.

The petitioner has cited no cases at all in point. His authorities are limited to those that hold generally that a

State cannot declare unlawful the innocent exercise of the right to engage in a common occupation of life, to make proper contracts in reference thereto, and that the State regulation thereof, under the police power, must have a direct relation, as a means to an appropriate end, to public health, morals, welfare or safety. The petitioner cites no cases at all that would indicate that this particular regulation by the State of Missouri is unreasonable, not a proper exercise of the police power, or in any way violative of the 14th Amendment of the Constitution. He relies upon the general principle that the State cannot prohibit an innocent and lawful act, and, therefore, cannot prohibit a proprietor of a public place from permitting his customers to engage in such innocent and lawful acts. Since the act of drinking in a public place is not made unlawful by the State, petitioner contends that it is innocent and lawful. Therefore, it follows from his syllogism that the State cannot prohibit the petitioner from permitting his customers the innocent and lawful act of consuming intoxicating beverages on his premises.

This is purely sophistry. It is glaringly so since the petitioner admits that the State could prohibit entirely the drinking or consumption of intoxicating liquor in public places and semi-public places, such as the place of business of the petitioner (p. 22, petition for writ of certiorari) and admits the right of the petitioner to control the conduct of his customers, even in respect to innocent and lawful acts (p. 21, petition for writ of certiorari).

Since the petitioner's whole case is based upon the contention that one of the liberties of the petitioner, protected by the Constitution, is the right to permit others to perform wholly innocent and legal acts, he admits (by way of deduc-

tion) that the State has the right to prohibit him from permitting persons under his control from performing acts which are not wholly innocent and legal. Therefore, petitioner's whole case turns on the defintion of "wholly innocent and legal acts."

The Federal question, if any such question exists, is one of a general nature, involving the power of a state to effect the interests of an extensive class of persons engaged in the business of selling, or providing for compensation, food, beverages, and entertainment, and permitting the uncontrolled consumption of intoxicants upon premises either owned or operated by them.

I.

a. The petitioner relies heavily upon the contention that Section 4895a, Laws of Missouri, 1945, makes it unlawful for one person to permit another to perform, what the petitioner asserts, is a wholly lawful and innocent act, that is, consume intoxicants. In other words, the statute is defective, so the petitioner contends, because the statute is directed at the operator and not the consumer. The respondents contend that this statute, Section 4895a, Laws of Missouri, 1945, comes within those statutes enacted for the health, safety, peace, comfort, morality and general welfare of the community or the citizenry of the state at large. Uncontrolled and unregulated drinking or consumption of intoxicants can be argued as detrimental per se. One has but to glance at the daily papers to discover constant and numerous items relating to dipsomania, car accidents and all types of injuries that flow directly from the uncontrolled *use* of intoxicants, fights and other distrubances, obscenities and lewdness that follow upon the excessive and unregulated use of intoxicants; all of these things directly result from the

use of intoxicants, and any statute that tends to minimize these harmful results from the use of intoxicants cannot be argued in any other way than being in favor of the general welfare of the citizenry of this state. Therefore, the respondents herein contend that the authorities and quotations to follow clearly show that the state has the right to regulate intoxicants unfettered by the restrictions laid down in the Federal constitution by the requirements of due process, or any of the restraints found in Section 1 of the Fourteenth Amendment to the Federal Constitution. Those restrictions simply do not apply where intoxicants are involved, for the Courts well know the dangers attendant upon the *use* of intoxicants.

The trial Court found that Section 4895a, Laws of Missouri, 1945, is not directed against the person who consumes the intoxicants, but is directed only against the person who *permits* the consumption of intoxicants in places providing food, beverages and entertainment for compensation. The trial Court found that the drinking or consumption of intoxicants was "wholly legal and innocent," and that it was defective for the act, Section 4895a, Laws of Missouri, 1945, to declare criminal the act of one who permits a "wholly legal and innocent" act. The use of the term "legal" by the court can mean nothing other than that the Legislature by enactment made it the privilege of the citizens of the State of Missouri to consume intoxicants. The consumption of intoxicants is not such a "legal" act as is the wearing of clothes, the eating of food or the smoking of tobacco. Those acts certainly are "legal" acts, yet the Legislature could regulate them and has to the extent of prohibiting lewdness, the spread of disease by unclean food, and the smoking of tobacco at certain times and

places. The act of consuming intoxicants is a "legal" act only because the Legislature made it such, and is not such an act that without the condonations of the Legislature it would be considered as such. The lower Court also found that drinking or consuming intoxicants was an "innocent" act. Suffice it to say that there may be explanations for drinking or consuming intoxicants, but no one can come forward with a justification for the use of intoxicants. Nowhere can anyone find any authority that proclaims the use of intoxicants as "innocent." Throughout time the use of intoxicants has been condemned as an act that promotes immorality, disturbances of the peace and destroys the comfort of the community and aids in making derelicts of men. Could the *use* of such an object be considered in any light as "innocent?"

Regarding the statement that this section, Section 4895a, Laws of Missouri, 1945, is not directed at the consumer but at the one who permits the act, we deem it well to point out that the Liquor Control Act of Missouri nowhere makes it a criminal offense for the consumer to do the things that are prohibited and made unlawful by said act. It is no offense for the consumer to purchase intoxicants from a person who does not have a license, but it is a felony under the Missouri law for any person not having a license to sell said intoxicant, see Sections 4895, 4898, and 4900(g) Mo. R. S. A. Other examples appear in various sections of Article 1, Chapter 32 the Liquor Control Act of Missouri, which demonstrate the fact that the Legislature has consistently throughout the act levelled the penalties at the operators, not at the consumers. That is where the control is sought to be placed. There can be a great degree of control exercised over a limited number of licensees under

the supervision of the Department of Liquor Control of the State of Missouri, those engaged in dispensing and selling intoxicants, but it would be impossible to control the actions of everyone that purchased an intoxicant and the resulting use of said intoxicant. The Legislature, therefore, has wisely placed the burden upon the licensees or operators of businesses which are in juxtaposition to intoxicants. Cognizant that the control of intoxicants will be best effected by that direction of the statutes, the Legislature has declared that it is not a crime for a minor to purchase intoxicants from anyone licensed or not, but it is a crime for any person licensed or not to sell, give away, or otherwise supply intoxicants or nonintoxicants to a minor. Sections 4885 and 4995a, Mo. R. S. A. It is not a crime for the consumer to purchase intoxicants during certain hours on Sunday or election day, but it is a crime for the licensee to make the sale of the consumer, Section 4891, Mo. R. S. A. There are many instances of this type of legislation in other fields of law, and even in Federal legislation. An outstanding example of this type of legislation is involved in the Act of Congress of June 25, 1910, commonly known as the Mann Act, or White Slave Act (36 Stat. 825). This Act makes it unlawful to transport or aid in transporting any woman in interstate commerce for immoral purposes. But the act of the woman in traveling in interstate commerce for immoral purposes is a wholly innocent and lawful act, in the sense that it is not made an unlawful act by Congress or by the States, which have no power over the act of traveling in interstate commerce. Even the immoral act contemplated on arrival at the destination of the trip may be one not made unlawful by State law, as the Englishman's prerogative is not everywhere made a crime. The Mann Act was, of course, held constitutional.

Therefore, if this statute, Section 4895a, supra, is to be held unconstitutional for the reason that it is not directed at the consumer, but at the person who permits the consumer to do an act, then many of the other provisions of our Liquor Control Act, Article 1, Chapter 32, R. S. Mo., 1939, must be held invalid on the same reasoning and the entire theory of the Liquor Control Act will be defeated. In the Supreme Court of the State of Missouri, the petitioner relied heavily upon the case of State v. Excelsior Springs Light, Power, Heat & Water Co., 212 Mo. 101, 110 S. W. 1079, as declaring void a statute which made it unlawful for another to *permit* someone else to commit a crime. The Supreme Court of Missouri, in its opinion, p. 61, Transcript of the Record, aptly points out why that holding was inapplicable to the present cause. Under the present statute there is a duty imposed upon the operator of a set-up establishment to prohibit the consumption of intoxicants during certain hours, and said duty is laid upon the operator "in, on or about" premises directly under his charge and control. The respondents contend that where by statute a duty has been imposed upon the operators of a class of business and when said duty is to be executed upon premises directly under the operator's control, there is no violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States, when it is declared to be criminal for the operator to permit another on his premises to breach the law. The petitioner has cited no cases whatsoever that even suggest that the State has no power to make it unlawful for the petitioner to permit drinking by persons under his control on his premises, unless it first makes it unlawful for such persons to drink on his premises.

The 21st Amendment returned to the States the exclusive control over the transportation and possession and use of liquor within the States. Viewed in the light of this Amendment to the Constitution, and in the light of the decisions of this Court in Ziffrin, Inc. vs. Reeves, 308 U. S. 132 60 Sup. Ct. 163, 84 Law Ed. 128; the State Board of Equalization, California, vs. Young's Market Co., 299 U. S. 59, 57 Sup. St. 77, 81 Law Ed. 38; Joseph S. Finch & Co. vs. McKittrick, 305 U. S. 395, 59 Sup. Ct. 256, 83 Law Ed. 246, holding powers of the States to control traffic in liquor to be absolute, it would seem tenuous to contend that a substantial Federal question is raised by this petition.

b. Petitioner also submits that the present statute, Section 4895a, Laws of Missouri, 1945, is violative of the due process guarantee by reason of the term "about". This term, petitioner claims, makes the statute so vague, uncertain and ambiguous as to prevent there being a standard of conduct sufficiently certain that reasonable men would not differ as to its meaning. We, the respondents, submit that the Supreme Court of Missouri in its opinion, as printed on page 62, Transcript of the Record, disposed of this contention.

The Act refers to the premises of a proprietor interested in the sale of food, beverages or entertainment. It is designed to regulate the policy of the proprietor of such an establishment in controlling the conduct of his customers with respect to the permission of the consumption of alcoholic beverages. Read as a whole it is perfectly clear that the Act is not designed to control the conduct of persons who are not on the premises, who are not customers of the proprietor, and who are not there in connection with the business operated by the proprietor. If the proprietor should set up tables on the sidewalk in front of his establishment, serve

his customers there, and provide them with food and entertainment, the law would seem to be applicable, even though technically the title to the sidewalk might be in the City. The use of the term "about" is appropriately designed to give an untechnical but common-sense interpretation to the application of the law. Persons not under the control of the proprietor, not his customers, not on his premises, or on places not so intimately connected therewith as to be a part thereof, particularly as operated, would clearly not come within the provisions of the law.

No one would expect a licensee to police the entire community, but only the premises as described in the application for such license itself. There is no vagueness, ambiguousness or uncertainty with respect to the duty which persons operating "set-up" places may have concerning the conduct of others in places other than in or upon the owner's premises. The duty applies only to the licensed premises, that is, those premises under the control of the operator. If the confusion in the mind of the petitioner exists because of the use of the term "about" that has been dealt with by the Supreme Court of Missouri, p. 62, Transcript of the Record. It is apparent that operators of "set-up" places do have control in, on or about the premises and there can be no indefiniteness as to their duty when permitting the consumption of intoxicants on said premises under the provisions of Section 4895a. The findings of the trial court that Section 4895a, lacks the necessary standard of conduct by which those to whom it is applicable can determine its meaning and application, can easily be refuted by the most cursory examination of said section. The meaning of said section is perfectly clear and particularly so as it applies in the instant case when read with the peti-

tioner's own evidence. The evidence showed that the petitioner would have to discontinue the operation of his establishment in the event Section 4895a, was enforced. That clearly demonstrates that the petitioner acknowledges the fact that "set-up" establishments do the major portion of their business within the hours in which section 4895a, prohibits the consumption of intoxicants. That is almost an express admission that the operation of a "set-up" establishment is dependent upon two things: one, permitting the unregulated and uncontrolled consumption of intoxicants, and two, remaining open to the public at hours and times when the ordinary retail liquor-by-the-drink establishments are required to cease their normal business activities. What could be a plainer admission of a recognized standard of conduct than that made by the petitioner in his own testimony. Section 4895a, Laws of Missouri, 1945, means exactly what it so plainly says—that those to whom it is applicable, those who furnish "food, beverages or entertainment for compensation" cannot permit the consumption or drinking of intoxicants on their premises between the hours of 10:00 P. M. and 6:00 A. M. the following day unless they possess a license from the Department of Liquor Control for the State of Missouri, in which event they may permit the consumption or drinking of intoxicants upon their premises from 6:00 A. M. until 1:30 A. M. the following day with the exceptions as stated in said section on Sundays and election days. Section 4895a, actually regulates the consumption or drinking of intoxicants. No better proof of this can be presented that the petitioner's own testimony wherein he stated that if Section 4895a was enforced his business would be a losing venture and that if he was prohibited from permitting patrons to consume or drink intoxicants within the

prohibited hours upon his premises, there would be no reason for said patrons to attend his establishment. The petitioner himself thereby proves that the regulation applies not to the business of providing food, beverages and entertainment, but regulates the major portion of his business, which is the permitting of patrons to engage in the unregulated and uncontrolled consumption of drinking of intoxicants at all hours and times upon his premises. As pointed the providing of food, beverages or entertainment can continue at any hour and on any day that the proprietor of a "set-up" establishment or any other establishment wishes to do so. Only the consumption or drinking of intoxicants, the financial backbone of these "set-up" establishments, is regulated.

c. The respondents have denied that there is a Federal question involved here, and even admitting the existence of the Federal question, the Supreme Court of Missouri has held (see opinion, pp. 54-64, Transcript of the Record) that the act in question and its enforcement in no way violates the Federal Constitution. Furthermore, the statute applies only to operators within the boundaries of the State of Missouri and is a state regulation of the *use* of intoxicants. There can be no doubt as to a state's exclusive right to regulate or control the use of intoxicants. Discussion under points III to VI, following, will clearly sustain this assertion. There can be no argument brought forward that will destroy the power of a state to affect the interests, especially when such interests are of a pecuniary nature, of a single class of persons whose interest or activities are so closely aligned with the use of intoxicants, that a regulation of same will cause the interest to increase or diminish. It is the intoxicant that is subject to regulation and the mere incidental

effect upon another's pecuniary interest by reason of such regulation is not an applicable argument in an attack upon said regulation; L'Hote v. New Orleans, 177 U. S. 587, 20 S. Ct. 788, 44 L. Ed. 899; Erie R. Co. v. Williams, 233 U. S. 685, 34 S. Ct. 761, 58 L. Ed. 1155.

II.

(a). The Supreme Court of Missouri undertook to determine whether or not the Federal guarantee of due process under Section 1, of the Fourteenth Amendment to the Constitution of the United States would be violated by the enactment and enforcement of section 4895A, Laws of Missouri, 1945. The Supreme Court of Missouri lengthily reviewed each decision cited by the petitioner in his brief to that Court and succinctly held, page 61, Transcript of the Record:

> "Neither of the above cases nor any case cited by the plaintiff (petitioner here) supports his contention that the act here in question violates due process, * * * (insert ours)."

Again, the Supreme Court of Missouri, in its opinion, page 62 of the Transcript of the Record, states:

> "We do not think that the act infringes upon plaintiff's (petitioner here) rights under the due process provisions of the state and federal Constitutions or deprives him of equal protection * * * * (insert ours) * * * *."

The Supreme Court pointed out that there was not one case that held what the petitioner contended. There is no case that is directly in point. It is a process of picking the applicable principles and applying them to the facts at hand, which in the instant case are novel. But even under

that reasoning the Supreme Court of Missouri did not find any of the principles announced in any of the cases cited by the petitioner which would apply to the instant case, and necessarily ruled against the petitioner in their opinion.

(b). The Supreme Court of Missouri expressly ruled against the contention of the petitioner that Section 4895a, Laws of Missouri, 1945, regulates not the consumption of intoxicants, but the business of providing food, beverages and entertainment for compensation. The Court at page 62, in its opinion, Transcript of the Record, held:

> "Plaintiff contends that the act "does not regulate the drinking or consumption of alcoholic liquor, but regulates the business of providing food, beverages or entertainment. The section plainly does not regulate the business of providing food, etc., it is only the drinking and consumption of intoxicating liquor that is regulated. * * * *".

The ruling is bottomed upon the plain and express language of the statute and the petitioner's own evidence which discloses beyond a doubt that if the statute is enforced and patrons are denied the right to consume intoxicants, uncontrolled and unregulated, they "just wouldn't come." The most cursory examination of the statute reveals just exactly what the Supreme Court of Missouri held, that the statute does regulate the consumption of intoxicants.

With these rulings of the Supreme Court of the State of Missouri in mind, the respondents believe that the correct attitude, both legally and morally, is found in the following points and the accompanying discussions.

III.

The prohibition and/or regulation of intoxicants is a matter within the power of the State.

There is no question but that the federal authorities admit and condone the power of the states to regulate intoxicants within the states' limits. This restoration of the states' power, in regard to intoxicants, came about through the enactment of the Twenty-first Amendment to the Federal Constitution, which restored to the states full power and jurisdiction over intoxicants, that is, the power to regulate their manufacture, possession, transportation, *use*, etc., unhampered by any of the federal limitations imposed upon Congress by the Constitution of the United States. The Twenty-first Amendment repealed the Eighteenth Amendment to the Constitution of the United States, which originally vested this prohibitory power in the Federal Government. The Twenty-first Amendment in its first sections, reads as follows:

> "Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> "Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The power of a state to regulate intoxicants has been acknowledged by the Supreme Court of the United States in many instances. In the case of Samuels v. McCurdy, 45 S. Ct. 264, l. c. 265, 267 U. S. 188, 69 L. Ed. 568, the United States Supreme Court laid down the following rules in regard to a state's power to regulate intoxicants consistent with the requirements of the Fourteenth Amendment:

> "It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be

consequent upon their use, a state has power absolutely to prohibit manufacture, gift, purchase, sale or transportation of intoxicating liquors within its borders *without violating the guarantees of the Fourteenth Amendment.*" * * * * "The Court pointed out that as the state had the power to prohibit it might adopt such measures as were reasonably appropriate or needful to render exercise of that power effective * * * * that *the right to hold intoxicating liquor for personal use was not one of those fundamental privileges of a citizen of the United States which no state could abridge.*" * * * Nor can legislation of that character come within the Fourteenth Amendment, * * * * "The ultimate legislative object of prohibition is to prevent the drinking of intoxicating liquor by any one because of the demoralizing effect of drunkenness upon society. * * * *" (Italics ours.)

Again in the case of Ziffrin, Inc. v. Reeves, 84 L. Ed. 128, 208 U. S. 132, 60 S. Ct. 163, l. c. 167, 168; the United States Supreme Court held that a state:

"* * * * may protect her people, against evil incident to intoxicants, * * * *" "* * * * in order to minimize well known evils, * * * *"

Another case indicating the extent of the police power of a state, after the adoption of the 21st Amendment, in the exercise of that power over intoxicants and the subjects over which, and the purposes for which the police power of a state may be exercised, is the case of Eberle vs. Michigan, 58 L. Ed. 803, 232 U. S. 700, 34 S. Ct. 464, l. c. 465.

"* * * * Liquor laws are enacted by virtue of the police power to protect the health, morals, and welfare of the public. * * * *"

The respondents believe that the above quoted cases clearly demonstrate that the United States Supreme Court recog-

nizes the power of a state to regulate intoxicants and the extent of said regulations is a matter solely within the power and the discretion of the state. Missouri's view regarding the power of a state in the regulations pertaining to intoxicants may be found in the following cases: Griesedieck Bros. Brewing Co. v. Moore, 262 Fed. 582; General Sales and Liquor Co. v. Becker, 14 F. Supp. 348; State v. Privitt, 39 S. W. (2) 755, 327 Mo. 1194; State v. Kennedy, 123 S. W. (2) 118, 343 Mo. 786; State ex rel. Klein v. Balsiger (Mo. App.), 151 S. W. (2) 521; State v. Parker Distilling Co., 237 Mo. 103, 139 S. W. 453.

Under the authorities, supra, there is no doubt but that a state may regulate intoxicants. That is what Section 4895a, Laws of 1945, does, that is, regulate the consumption of drinking of intoxicants upon particular premises and at particular times.

Therefore, the respondents contend that under the law the present statute is a regulation of the consumption of intoxicants, that it has been established that the state has the power to regulate intoxicants in any manner which will reasonably bring about the protection of her citizenry and minimize the evils attendant upon the use of intoxicants.

IV.

All the Regulations and/or prohibitions relating to intoxicants grow out of the police power of the State.

All statutes regulating the manufacture, sale or *use* of intoxicants are enacted by virtue of the police power of the state. Every statute, state or federal, upon the subject, which has been held constitutional, was sustained upon the ground that it was the proper exercise, by the legislature, of the police power of the state. See the following cases for

affirmance of that statement: Licenses Cases, 12 Law Ed. 314; 8 Cyc. 683; Griesedieck Bros. Brewery Co. v. Moore, 262 F. 582; General Sales and Liquor Co. v. Becker, 14 F. Supp. 348.

Unquestionably, a state may and has regulated intoxicants as to manufacture, possession, importation, transportation, *use*, and so on, and unquestionably a state has the power to regulate premises or places of business where liquor is consumed as to the hours when it may be consumed. The regulation in this instance is only upon the use or consumption of the liquor as to where and when it is consumed.

The reason for this police power is that intoxicants are such subjects as tend to deprave the public morals. In other words, intoxicants have noxious qualities and therefore may be regulated by a state in the interests of the public. Authority holding that this power to regulate comes under the police power generally, is 33 C. J., Sec. 34, Page 505, which provides as follows:

> "Under their inherent police power, * * * * the right to prohibit, regulate, or restrain, * * * * the state had power to enact any and all laws for the suppression of intemperance and the minimizing of the evils resulting from the traffic in intoxicating liquors by totally prohibiting or by restricting and licensing * * * *."

Note particularly that the above quotation speaks of the state's power to enact *any and all* laws for the suppression of intemperance and the minimizing of the evils resulting from the *use* of intoxicants by restricting or prohibiting their use. There is no complete prohibition in Section 4895a, Laws of 1945, merely a reasonable regulation of the consumption of intoxicants at particular premises and at

particular times. Obviously, under the authorities and cases cited and quoted from supra, this statute is an exercise of the state's police power to regulate intoxicants, and such an exercise is an outgrowth of the police power of the state.

V.

The State having the power to prohibit intoxicants by an exercise of its police power, it has the lesser power to appropriately regulate intoxicants in any manner which is to the general good of its citizenry.

Having shown that intoxicants do possess noxious qualities, and having shown by the authorities and cases quoted from supra, that a state does have the power to regulate intoxicants as to manufacture, sale, transportation, *use* and so on, a state undoubtedly has the right to regulate the consumption of intoxicants and the regulation here applies only to the consumption of intoxicants in places particularly conducive to the use of intoxicants.

From the rule established in Point IV above, and cases with which the Court is familiar, the principle is established that a state may impose any limitations, conditions, burdens, or responsibilities on those engaged in selling, manufacturing or using intoxicants. While no sale or manufacturing of intoxicants is concerned here, there is such a *use* of intoxicants as to bring the unregulated and uncontrolled consumption of intoxicants within the police power of the State.

There is no reason why the *use* of intoxicants should not be subject to regulations when the greater act is subject to regulation, that greater act being the sale and manufacture of intoxicants.

The state, in the exercise of its police power, has regulated various phases of the use of intoxicants. Different ex-

amples of a state's exercise of its police power in the regulation of intoxicants, are found in C. J. Vol. 33, Sec. 44 et. seq., page 514. Quoting, in part, from Section 44, we find the following:

> "* * * * so the legislature might prohibit such sales in places where, by reason of the character of the place itself or of the neighborhood, the traffic was likely to be unusually dangerous or detrimental to the morals or good order of the community."

Further, regulations as to the quantity sold have been sustained. Regulations prohibiting the sale to certain classes of people, minors, drunkards and intoxicated persons, have been sustained. Regulations by statute providing for the hours of closing and sale on particular days have been sustained. General traffic in liquors, that is, the general conduct of the liquor business, has been regulated to minimize the danger to the community or harm to individuals resulting from the use of intoxicants. Laws as to inspections, as to display of licenses, providing for screening of the bottled goods, refraining from using women and children as employees, the exclusion of women from particular rooms—all of these have been subject to state regulation and have been sustained as valid regulations on intoxicants under the police power of the state. See the citation of Corpus Juris, supra, for discussion of these regulations. Under the police power of a state, regulations have even been permitted of non-intoxicants. In C. J., Vol. 33, Sec. 65, page 519, the following is found:

> "* * * * It may regulate or prohibit the manufacture of, the traffic in, beverages not in fact intoxicating but which are of such a nature as to lend themselves to evasions of the law as to intoxicants."

The above cited and quoted from cases and authorities clearly show that a state can prohibit intoxicants altogether. It necessarily follows that a state can regulate intoxicants to any extent it chooses. The greater power, the power to prohibit entirely, includes the lesser power, the power to regulate, and here under Section 4895a, Laws of 1945, regulations of the consumption of intoxicants is only done as time and place.

The Ziffrin case, cited supra, expressly acknowledges that the power to prohibit contains the power to regulate. Therein it is stated at loc. cit. 167:

"The greater power includes the less. * * * *"

Further examples that other states have seen and recognized the evils attendant upon the operation of "set-up" establishments and have deemed it necessary to place a control upon that type of place, may be found in the laws of at least two other states. While the statutes of these other states are not word for word like the one under consideration, the obvious intent of the legislature of those states to control this unregulated and harmful-to-society consumption of intoxicants, is evident. The California Liquor Control Act, Section 53.2, allows the law enforcement officers of California to enjoin any place permitting the unregulated consumption of intoxicants. Again the legislature of the state of Indiana felt that the interest of society in Indiana would be best served by the outlawing of places primarily established and used for the unregulated consumption of intoxicants. The statutes of Indiana, Indiana Liquor Control Act, Section 12-439, is the one most nearly like the Missouri statute and applies to places where beverages and entertainment are provided and specifically names restaurants. We will not weary the Court with quoting the sections of the California

and Indiana Liquor Control Acts referred to here, but do commend them to the Court for the precedent they establish and the fact that they imply those states' recognition of the evils that flow from the unregulated consumption of intoxicants. It is, therefore, clear that Missouri does not stand alone in recognizing the evils that result and the danger to society that exists, when "set-up" establishments are permitted to operate without any regulations or control.

Therefore, as we have shown, a state has the power to regulate the use of intoxicants within its jurisdiction, and that it is a matter for state regulation, the *use* of intoxicants. We believe that we have shown that such regulation of the use of intoxicants can apply to the consumption of intoxicants as to places or premises and the time of consumption thereon; that a regulation of the nature here involved is an exercise of the police power of the state and should be considered as such; that a state having the power, under its policing authority, to prohibit intoxicants completely, the state has the lesser power to regulate the use of intoxicants in any manner conducive to the advancement or the safety of the community, the protection of its citizenry, or the general welfare of the public.

VI.

The present statute, Section 4895a, Laws of 1945, supra, is a reasonable regulation of intoxicants.

In the present instance the State of Missouri has undertaken to regulate by statute consumption of intoxicants upon a particular type of premises and to indicate the particular times when consumption of intoxicants may be permitted. As we all know, the particular type of place to which this law was intended to apply was the "set-up" establishment.

Under the guise of being a restaurant or place of entertainment, the ordinary patron could come into an atmosphere conducive to intemperance and consume upon the premises at any time and without restraint any intoxicant which he chose to bring into said place. While the liquor laws applying to the sale of intoxicants by-the-drink restrict the licensee of the intoxicating liquor by-the-drink establishments to particular hours in making sales and permitting consumption, the ordinary "set-up" place could operate at any time, any day, without restriction in any manner. Such places aided in nullifying the effect of the other statutes which prohibited sales at particular times in by-the-drink establishments by encouraging patrons to purchase their own intoxicants and bring them into the "set-up" places at those times which the state law had prohibited regularly licensed by-the-drink places from operating, Sec. 4891, Laws of Missouri, 1941.

The present statute is a valid exercise of the police power of this state as a regulation only to the hours or time at which the licensee may permit the drinking or consumption of intoxicants upon his premises. There can be no doubt that a state has the power to regulate the possession, *use*, transportation or manufacture, and a state legally can also regulate the premises where liquor is consumed, also a state can regulate as to the hours when it may be consumed, in the interests of it citizenry.

The regulation in this instance operates upon and follows the *use of the intoxicant*. If the patron wishes to attend the petitioners place of business and does not bring any liquor along, or care to drink, he is not required to do so, and suffers in no way from the regulation, but the patron who does come to petitioner's place of business, or any similar business

place, who does wish to drink intoxicants, does so subject to this state regulation, which limits the consumption of liquor to particular places, to particular times, and in such a manner as to be conducive to temperate drinking, ordinary conduct, and tends to improve, safeguard and keep the public morals. Only those persons who engage in a harmful exercise of their powers by consuming or drinking intoxicants come within this regulation. This is not such a right or fundamental privilege, the consumption of intoxicants, that anyone has the privilege of executing it the way he sees fit; Samuels v. McCurdy, cites supra. We have statutes and ordinances providing penalties for those persons who consume such a quantity of liquor as to become intoxicated and harmful or dangerous to themselves and others. In the state of Missouri we have prohibitory laws regarding people who drive cars in a drunken or intoxicated condition. We can regulate all of these things in the interest of the public, its safety and morals, and it is certainly a valid evercise of the police power to regulate or to make such regulations that tend to further the protection of the public, its safety and morals, and reduce intemperance.

Section 4895a, supra, is under no possible construction to be considered as directed at the restricting or regulating of the act of "providing food, beverages or entertainment for compensation." Any owner or proprietor of any establishment that "provides food, beverages or entertainment for compensation" may continue to do so in any manner he chooses. Only the permitting of the consumption of intoxicants within certain times is prohibited and regulated by the statute. If the owner permits the consumption of intoxicants, he must do so in accordance with the statute. If no consumption of intoxicants is permitted, there is no regulation of the

statute applicable to any other phase of the business. An examination of the statute here involved will conclusively disclose that this is the correct analysis, both as to the patron and the proprietor. The serving of food or beverages and the providing of entertainment may continue, subject only to the provider's discretion. There simply is no restraint or regulation imposed upon those activities. Again we say, only the consumption of intoxicants is regulated. Even operating under the license required by the law, the proprietor of such an establishment would have no other duty than to prohibit the drinking or consumption of intoxicants within the designated times.

This is a regulation only as to the actual drinking or consumption of intoxicants, as to time, and to a particular class of business. It applies to all alike in the same business. Any person who engages in the "set-up" business is subject to the same license and the same restrictions and regulations. All within the same class are treated alike; therefore, there is no discrimination. This regulation tends to restrain the consumption of liquor, either temperately or intemperately done, and thereby promotes the general welfare and the public good, and all licensees are charged alike with the duty to regulate consumption of intoxicants. In C. J., Vol. 33, Sec. 44, page 514, the right of a state, under its police power, to regulate premises, is found:

> "* * * * So the legislature might prohibit such sales in places where, by reason of the character of the place itself or of the neighborhood, the traffic was likely to be unusually dangerous or detrimental to the morals or good order of the community. * * * *"

Places that sell "set-ups" for use with intoxicants are conducive to intemperance, the very thing which the regula-

tory law on intoxicants attempts to minimize. In C. J., Vol. 33, Sec. 48, page 515, the method of conducting a business and the power to regulate same is found:

> "Persons licensed to sell intoxicants may be subjected to such supervision and control, in the conduct of their business, as will tend to preserve good order, prevent violations of the law, discourage intemperate drinking, and minimize the dangers to the community or the harm to individuals resulting from the traffic in liquors."

There is nothing in the statute which is discriminatory. Anyone who engages in the sale of "set-up" is regulated as to the time when intoxicants used with said setups may be consumed upon the premises, and in no other manner. That this regulation tends to promote the general welfare is found in the fact that it limits the time by establishing definite periods when intoxicants may or may not be consumed upon a particular premise, which acts as a deterrent in favor of public temperance. Furthermore, the statute subjects the licensed premises to inspection and supervision in the interests of the public morals, public temperance, and public order by bringing the licensee under the state laws and regulations of the liquor Supervisor of the State of Missouri. This will tend to promote the general public good, and minimize the evils which come from the use of intoxicants.

As we have pointed out supra, a state is allowed to regulate nonintoxicants in order to minimize drinking. C. J., Vol. 33, Sec. 65, page 519, reads as follows:

> "* * * * the legislature may regulate or prohibit the manufacture of, or traffic in, beverages not in fact intoxicating but which are of such a nature as to lend themselves to evasions of the law as to intoxicants. * * *"

The quotation from C. J., supra, is particularly apt wherein it states "beverages not in fact intoxicating but which are of such a nature as to lend themselves to evasions of the law as to intoxicants" may be regulated. This is the type of place, the "set-up" place, that lends itself to evasions or breaches of the law, not only the liquor law, but all laws relating to public order and conduct. That statement alone is authority for the enactment of the present statute by this state to regulate the use of particular types of beverages along with intoxicants.

The cases cited in the first point of this brief again and again point out that the states may enact laws aiding in the effectuation of the general regulatory law. That is what has been done under Sec. 4895a, supra. The general Liquor Control law regarding intoxicants is aided.

The present statute assists in bringing into conformity with the purpose of the state liquor control law all places where intoxicants are permitted to be consumed. It further brings these places into conformity with the purpose behind the regulations of those places that deal in the sale of intoxicants. That this statute is not a suppression of any right, but a mere restriction or restraint on the use of a subject possessing noxious qualities, and that it is a proper regulation of such, cannot be denied.

This is not the first time that Missouri in the exercise of her police power has undertaken to regulate the consumption of intoxicants as to the time and place, and such regulation was enacted in the behalf of good order and the public morals. In the statutes of 1919, Section 3495, R. S. Mo., 1919, we find a prohibition of the consumption of intoxicants at particular times and places, therein it is provided:

"Sec. 3495. Intoxicated persons on passenger trains—penalty.—It shall be unlawful for any person in this state to enter a passenger train or car, kept for the conveying of passengers, intoxicated, or drink intoxicating liquor on said passenger train or car, or to exhibit or carry exposed any intoxicating liquor on said passenger trains or cars, and every person or persons so doing shall be guilty of a misdemeanor, and fined not less than five dollars or more than twenty-five dollars for said offense. (R. S. 1909, 4710).

Note that the statute provides that it shall be unlawful for anyone to "drink intoxicating liquor on said passenger train or car." There the Legislature of Missouri undertook to determine that the *use* of intoxicants in that particular place was against the general public good and prohibited the doing of the same. Why should not the Legislature of Missouri in the exercise of the police power of the state regulate the consumption of intoxicants in "set-up" places? The Legislature of Missouri has the undoubted power to entirely prohibit the use of intoxicants in such places—is there any reason why the Legislature of Missouri may not enact such regulation as tend to minimize the harmful and dangerous effects of the consumption of liquor? Statistics will show a staggering increase in the crime wave, the death rate from car accidents and the resulting misery and pauperism that flows to the dependents or relatives of those injured or killed, all linked to the use of intoxicants. Minimizing these evils is in the interest of the public. That will be the effect of Sec. 4895a, supra.

The fact that the petitioner in this instance, we contend, misconceives the effect of the statute, Section 4895a, supra, is no reason that he should be granted the relief prayed for. Better it is that the respondent and other such operators

as "set-up" establishments should be instructed that the statute in this instance does not require the closing up of the establishment but merely regulates the consumption of the intoxicants upon the premises at particular hours. Petitioner would not be compelled to eject his patrons at any time. The petitioner can operate at any and all times in the "providing of food, beverages or entertainment for compensation." It is only in the "permitting of the drinking or consumption of intoxicants" that the statute imposes upon him the obligation to prohibit the consumption or drinking within certain times, those times being clearly set out by the statute. Again, let us reiterate, the statute is not directed at the "providing of food, beverages or entertainment for compensation," but only at the drinking or consumption of intoxicants within the prohibited times. That and that alone is the regulation contained in the statutes.

CONCLUSION.

We believe that we have shown that Section 4895a, Laws of 1945, supra, does regulate the consumption of intoxicants and not the business of providing "food, beverages or entertainment for compensation," therefore, we believe that it has been clearly and decisively demonstrated that the State of Missouri has the power to prohibit and/or regulate intoxicants. Approval of this power is found in both the federal and state decisions cited and quoted from under Point III, supra.

Secondly, we believe that we have shown that all regulations related to or directed at intoxicants grow out of the police powers of the state; that in the exercise of that power the state may enact any and all laws for the suppression of

the evils or the minimizing of the evils that grow out of the use of intoxicants.

Thirdly, we believe that the state, having the power to absolutely prohibit intoxicants, has the lesser power to appropriately regulate intoxicants in any manner or to any degree which is consistent with and in the aid of the public good, the public morals, and the protection of the state's citizenry.

And, finally, we believe that we have shown that this statute, Section 4895a, supra, is a reasonable regulation of intoxicants; that it is directed only at the consumption of intoxicants and at no other action. We believe that this is a subject upon which the police power of this state may be validly exercised and in the manner as it has been exercised.

PRAYER.

WHEREFORE, the Respondents submit that upon the reasoning and principles as mentioned it clearly appears that the Act of the 63rd General Assembly of Missouri herein questioned does not deprive this petitioner of his liberty and property without due process of law, and in no way violates Section 1 of the Fourteenth Amendment to the Constitution of the United States.

It consequently follows that the Supreme Court of Missouri was not in error in its ruling and the Respondents respectfully submit that this Honorable Court should refuse to issue a writ of certiorari to the Supreme Court of Missouri in this cause.

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